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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NO. 375

WESTERN CARTRIDGE COMPANY, a Corporation,
Petitioner,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

COLIN C. H. FYFFE,
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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

	PAGE
Petition for writ of certiorari	1
Statement of case	1
Jurisdiction of this court	4
Reasons relied on for allowance of writ	4
Brief:	
I. The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause; Clause 3, Section 8, Article I, of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding	7
II. The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.	8
III. The Supreme Court of Illinois erred in holding that the decision of this Court in the case of Hump Hairpin Company v. Emmerson, 258 U. S. 290, was decisive of this case.	9

PAGE

IV. The decision of Hump Hairpin Mfg. Company v. Emmerson is not applicable to the present case. The interstate commerce of petitioner was the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned. 12

CASES CITED.

Airway Electric Appliance Corp. v. Day, 266 U. S. 71 ..... 7, 9, 10, 11

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 11

Baltic Mining Co. v. Massachusetts, 231 U. S. 68 11

Cudahy Packing Co. v. Hinkle, 49 Sup. Ct. Rep. 204 ..... 7, 11

Dahnke Walker Milling Co. v. Bondurant, 257 U. S. 282 7

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290 ..... 7, 9, 12, 13

International Paper Co. v. Massachusetts, 246 U. S. 135 ..... 7, 10

Looney v. Crane Co., 245 U. S. 178 ..... 7, 10

Pullman Company v. Kansas, 216 U. S. 57 7

Western Union Telegraph Co. v. Kansas, 216 U. S. 1 7

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The petition of Western Cartridge Company, a corporation, respectfully shows to this honorable Court:

A.

Statement of the case.

The petitioner prays for a writ of certiorari to review an order of the Supreme Court of Illinois affirming a decree of

the Circuit Court of Sangamon County, Illinois, dismissing a bill for an injunction filed in that court by the petitioner.

The order of the Supreme Court of Illinois was entered April 20, 1929, and an order denying a petition for rehearing was entered on June 6, 1929.

The petitioner, a foreign corporation, organized under the laws of the State of Delaware and licensed to do business in Illinois, filed its bill of complaint to enjoin Louis L. Emmerson, then Secretary of State of Illinois, from paying over to the State Treasurer of Illinois the amount of the license fee collected by him from the petitioner.

This license fee was assessed and collected under Section 105 of the General Corporation Act of Illinois. This section provides:

> "Section 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the secretary of state of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no property or business in this state.
>
> In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

The total property of petitioner was $6,924,804.92, of which $6,894,903.27 was located in Illinois. (R. 3.)

The total business of petitioner for the year upon which the tax was determined amounted to $11,670,925.51. Of this amount $9,751,042.78 consisted of sales of goods to customers

outside the State of Illinois; the shipments being made from Illinois to customers outside the state, pursuant to orders sent by these customers to the petitioner in Illinois. The petitioner sent a written acceptance of the offer to the customer. (R. 28.)

The business so transacted was reported by petitioner in its annual report as interstate commerce. It was regarded by the Secretary of State as "business transacted in Illinois," and was included by him in determining the proportion of petitioner's capital stock represented by property located and business transacted in Illinois.

The license fee collected from petitioner amounted to $2,808.03. If the Secretary of State had not included the interstate business of petitioner as "business transacted in Illinois" in computing the tax, the license fee would have amounted to $1,479.22. The license fee of petitioner was increased $1,328.81 by the inclusion of interstate business in computing the tax. (R. 3.)

The Circuit Court of Sangamon County dismissed the bill of complaint and the Supreme Court of Illinois affirmed the decree of the Circuit Court. The decision of the Supreme Court is reported in Vol. 335 of the Illinois Reports, page 150. It is found in the record, pp. 62 to 66. The Supreme Court of Illinois held that the decision of this Court in *Hump Hairpin Mfg. Company* v. *Emmerson,* 258 U. S. 290, was decisive of the case and that the license fee was not directly imposed or computed upon the proceeds of interstate commerce.

The license fee imposed by the Secretary of State of Illinois on your petitioner is a direct burden on the interstate commerce of your petitioner, and is in violation of Clause 3, Section 8 of Article I of the Constitution of the United States.

B.

Jurisdiction of this Court.

The jurisdiction of this Court to review by certiorari the decree entered by the Supreme Court of Illinois, affirming the decree of the Circuit Court of Sangamon County, is based on Section 237 of the Judicial Code, as amended, (U. S. Code, Title 28, Sec. 344).

C.

Reasons relied on for allowance of writ.

I.

The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause, Clause 3, Section 8, Art. 1, of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding.

II.

The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.

III.

The Supreme Court of Illinois erred in holding that the decision of this Court in the case of *Hump Hairpin Mfg. Company* v. *Emmerson*, 258 U. S. 290, was decisive of this case. The later decisions of this Court in *Airway Electric Appliance Corporation* v. *Day*, 266 U. S. 71; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, and *Cudahy Packing Company* v. *Hinkle*, 49 Sup. Ct. Rep. 204, decided February 18, 1929, are decisive.

IV.

The decision of this Court in the case of *Hump Hairpin Company* v. *Emmerson*, is not applicable to the present case. The interstate commerce of petitioner is the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding that Court to certify and send to this Court a full and complete transcript of the record and all proceedings in said Supreme Court of Illinois in said cause, and that this cause may be reviewed and determined by this Court as provided by the Acts of Congress; and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and that the said decree of the said Supreme Court of Illinois may be reversed by this honorable Court.

Western Cartridge Company,
Petitioner.

Colin C. H. Fyffe,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

The inclusion of interstate business of petitioner as "business transacted in Illinois" in computing the annual license fee assessed on it as a foreign corporation for the privilege of doing business in Illinois under Section 105 of the Illinois Corporation Act imposed a direct burden on the interstate commerce of petitioner contrary to the commerce clause, Clause 3, Section 8, Article I, of the Constitution of the United States, and the Supreme Court of Illinois erred in not so holding.

The petitioner shipped its goods from Illinois to purchasers in other states pursuant to orders received from the purchasers for such goods. This course of business was interstate commerce.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S. 290.
Dahnke Walker Milling Co. v. *Bondurant*, 257 U. S. 282.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.

This Court has held in a long line of cases that a license fee imposed on a foreign corporation for the privilege of doing business within a state is invalid if it constitutes a burden on the interstate commerce of the corporation.

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1.
Pullman Company v. *Kansas*, 216 U. S. 57.
Looney v. *Crane Company*, 245 U. S. 178.
International Paper Co. v. *Massachusetts*, 246 U. S. 135.
Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71.
Cudahy Packing Co. v. *Hinkle*, 49 Sup. Ct. Rep. 204, decided February 18, 1929.

The fundamental principle laid down in all of these cases is that a state cannot require a foreign corporation, as a condition of the right to do a local business, to submit to a tax on its interstate business.

The tax imposed in this case is a tax on the interstate business of your petitioner. Over nine million dollars of interstate business is taxed as business done in Illinois. This is a burden on the interstate business of your petitioner.

II.

The burden on the interstate commerce of the petitioner is substantial and direct. Its license fee was almost doubled by the inclusion of interstate commerce as "business transacted in Illinois." The Supreme Court of Illinois erred in holding that the tax was not directly imposed or computed on interstate commerce.

Petitioner paid a license fee of $2,808.03 for the privilege of doing business in Illinois. This fee should have been based on the proportion of its capital stock represented by business transacted and property located in Illinois.

The total issued capital stock of petitioner is $5,701,800. It was assessed on $5,616,060 of this stock, which was the proportion which the Secretary of State found was represented by Illinois property and business. Petitioner paid the tax so assessed under protest.

If petitioner's interstate business amounting to $9,751,042.78 or about five-sixths of the total business, had not been included, the petitioner would have been taxed on $2,978,440 of its capital stock.

The difference between these two amounts or $2,637,620 is the part of the capital stock of petitioner represented by interstate commerce which is taxed. The tax thus based on the

stock of petitioner represented by interstate commerce is $1,328.81. This amounts to almost fifty per cent of the tax paid by petitioner.

The tax was directly computed on stock represented by interstate transactions and was increased almost fifty per cent by the inclusion of such transactions as Illinois business.

III.

The Supreme Court of Illinois erred in holding that the decision of this Court in the case of Hump Hairpin Company v. Emmerson, 258 U. S. 290, was decisive of this case.

The decision of this Court in *Hump Hairpin Mfg. Company* v. *Emmerson* is not decisive of the present case. In the *Hump Hairpin case,* this Court held:

> "The statute and the State Supreme Court both show a candid purpose to differentiate state from interstate business, and to use only the former in determining the amount of the disputed tax."
>
> * * *
>
> "The tax is not imposed directly upon the proceeds of interstate commerce, and is not computed upon it."
>
> * * *
>
> "At most, the assessment, so far as interstate commerce is concerned, is incidental, remote and unimportant."

In the later case of *Airway Electric Appliance Corporation* v. *Day,* 266 U. S. 71, this Court held that a license fee based on the authorized stock of a foreign corporation, which was engaged in interstate commerce, was invalid because it directly burdened interstate commerce. This Court said, at page 82:

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate *to all the shares* or to a number greater than the total outstanding, necessarily amounts to a *tax* and *direct* burden upon all the property and business including the interstate commerce of the plaintiff." (Italics ours.)

The interstate business of the Airway Company was transacted in the same manner as that of petitioner. All of the Airway Company's property was located in Ohio. 266 U. S. 71 at 78. It manufactured its product in Ohio and sold it within the State of Ohio and in interstate commerce.

This decision is expressly applicable to the present case. This Court held that if unissued shares were taxed, interstate commerce was necessarily burdened. *A fortiori* if the tax is based on shares that are brought into the computation solely because they represent interstate commerce, interstate commerce is taxed and the tax must necessarily be invalid.

This Court has held that interstate commerce is burdened when the license tax is based on all of the shares of a foreign corporation. *Looney* v. *Crane*, 245 U. S. 178; *International Paper Co.* v. *Massachusetts*, 246 U. S. 135. It is also burdened when the tax is based on authorized stock not issued. *Airway Electric Appliance Corp.* v. *Day*, 266 U. S. 71.

In the present case, interstate commerce is burdened where the tax is based on shares directly attributable to interstate commerce. The burden is more apparent than in either of the other two classes of cases.

In all three cases the tax is based on the capital stock of the corporation. When part of the stock on which the tax is based is represented by interstate commerce, the tax burdens interstate commerce. In the present case, part of the capital stock of petitioner upon which the tax is based is expressly represented by interstate commerce.

In case of a tax on all of the capital stock, or on the authorized capital stock, the interstate commerce of a corporation is necessarily taxed. In the present case the burden is even more evident. Interstate business is treated as "business transacted in Illinois" and is expressly included in de-

termining the part of the capital represented by business and property in Illinois. The tax is expressly imposed on stock represented by interstate commerce.

This Court has expressly held in two recent cases that interstate commerce cannot be burdened even if the burden is slight and unimportant and has definitely disapproved the language in earlier cases to the contrary.

In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, at 218, this Court held:

> "It must now be regarded as settled that a state may not burden interstate commerce under the guise of regulating or taxing intrastate business. * * * The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved."

In the case of *Cudahy Packing Company* v. *Hinkle,* 49 Sup. Ct. 204, the Court quoted the above language from the *Alpha Portland Cement case* and said:

> "*Baltic Mining Co.* v. *Massachusetts,* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the state may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.,* and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*"

Not only the case of *Baltic Mining Co.* v. *Mass.,* 231 U. S. 68, but any other case, insofar as it tends to support a different view, must likewise be definitely disapproved.

This Court in the *Airway case* held that the interstate business of a foreign corporation must not be burdened, even though all of the property of the foreign corporation is located within the taxing state, and all goods are shipped from that state.

These decisions of this Court, and not the *Hump Hairpin case,* are decisive of the present case. The *Hump Hairpin case,* insofar as it is in conflict with these later decisions, must have been disapproved by this Court.

IV.

The decision of Hump Hairpin Mfg. Company v. Emmerson is not applicable to the present case. The interstate commerce of petitioner was the largest element entering into the computation of the tax, and the assessment is not incidental, remote or unimportant so far as interstate commerce is concerned.

In the *Hump Hairpin case* the interstate business amounted to $235,000, the business done with residents of the state amounted to $25,000, and the property of the corporation, all of which was in Illinois, amounted to $5,540,000. This Court pointed out that the interstate commerce was only one of three factors and "if the fee or privilege tax were computed at the statutory rate on the whole of the interstate business, it would be trifling in amount, but if computed on the property admitted to have been in use in the state, it would be but slightly less than the amount collected."

In the present case the amount of the property of petitioner in Illinois is $6,894,903.27, and the amount of interstate business transacted by it is $9,751,042.78. The intrastate business of petitioner was only $1,919,882.73. The total business of petitioner was $11,670,925.51.

The secretary of state, in determining the proportion of petitioner's capital stock represented by business and property in Illinois, used the following formula:

$$\frac{6{,}894{,}903 \text{ (Ill. prop.)} + 11{,}670{,}925.51}{6{,}924{,}804.92 \text{ (All prop.)} + 11{,}670{,}925.51} = .998$$

and taxed petitioner on 99.8 per cent of its issued capital stock.

If the secretary of state had not included interstate business, the following formula would have been used:

$$\frac{6,894,903.00 + 1,919,882.73}{6,924,804.92 + 11,670,925.51} = .522$$

Petitioner should have been taxed on 52.2 per cent of its capital stock.

Petitioner was taxed on 47.6 per cent of its stock which was attributable to interstate commerce. This additional tax amounted to $1,328.81. This additional tax was over forty-five per cent of the tax actually paid, and almost ninety per cent of what the tax should have been.

Such a burden is not incidental or remote. The interstate business of petitioner was the largest element entering into the computation of the tax, and the tax was almost doubled by its inclusion.

In the *Hump Hairpin case* this Court said at page 293:

> "If the Secretary of State or the Court, in computing the tax, erroneously treated as intrastate that which was really interstate business, such error would be reason in a proper case for correcting the computation."

Yet, in the present case, the Supreme Court of Illinois has failed to correct the computation where the tax is practically doubled by the inclusion of interstate commerce. The State Supreme Court has held that such interstate business was "business transacted in Illinois."

Section 105 of the General Corporation Act of Illinois as now construed by the Supreme Court of Illinois, requires a foreign corporation to pay a license fee for the privilege of doing business in Illinois directly computed on the interstate business of the corporation.

The State Supreme Court no longer shows a "candid purpose to differentiate state from interstate business and to use only the former in determining the amount of the dis-

puted tax." This Court's holding that a computation including interstate commerce should be corrected has been ignored, and the decision of this Court has been relied upon as authorizing the imposition of a burden on interstate commerce.

The decision of the Supreme Court of Illinois holding Section 105 of the General Corporation Act of Illinois valid, imposes a direct and substantial burden on the interstate commerce engaged in by your petitioner in violation of Article I, Section 8, Clause 3, of the Constitution of the United States. It is respectfully submitted that a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Illinois.

Respectfully submitted,

COLIN C. H. FYFFE,
Counsel for Petitioner.